BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NUMBER 41J 11508000 BY SPRINGDALE COLONY	))))	**PROPOSAL FOR DECISION**

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on January 22, 2004, in White Sulphur Springs, Montana, to determine whether a beneficial water use permit should be issued to Springdale Colony, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, James B. Lippert. John Wipf, Co-director and Farm Boss of Springdale Colony; Dan Hurwitz, area resident; Otto Ohlson, Natural Resources Conservation Service Soil Technician (retired), and Joe Michaletz, Consulting Geologist; testified for the Applicant.

Objector Montana Department of Fish, Wildlife and Parks (FWP), appeared at the hearing by and through counsel, Rebecca J. Dockter and Robert N. Lane. Dr. Eloise Kendy, Kendy Hydrologic Consulting; Kathleen Williams, FWP Water Resources Program Manager; Steve Leathe, FWP Regional Fisheries Manager; and Jack M^{c}Guire, area irrigator, testified for the Objector.

Scott Irvin, Regional Manager, and Andy Brummond, Water Resources Specialist, both of the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department); Bill Uthman, Hydrogeologist, and Larry Dolan, Surface Water Hydrologist, both of the Water Management Bureau of the Water Resources Division of the Department were called to testify by Objector FWP.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered nine exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1-A9.

Applicant's Exhibit A1 is an 11" x 17" map of Springdale Colony's point of diversion and place of use .

Applicant's Exhibit A2 is an eight-page copy of the Applicant's pumping test data.

Applicant's Exhibit A3 is one-page map showing selected wells near the Springdale Colony well.

Applicant's Exhibit A4 is one-page graph of Springdale Colony pumping well and observation well water level fluctuations prepared by Applicant's expert.

Applicant's Exhibit A5 is an 11" x 17" cross-section showing wells, subsurface geology, and water table drawdown prepared by Applicant's expert.

Applicant's Exhibit A6 is a one-page map showing an estimated radius of influence.

Applicant's Exhibit A7 is one page containing copies of three photographs taken by Applicant's expert.

Applicant's Exhibit A8 is a one-page well log simplification prepared by Applicant's expert.

Applicant's Exhibit A9 is a one-page geologic map of the area copied from a United States Geological Survey (USGS) publication by Applicant's expert.

Objector offered thirty-seven exhibits for the record. The Hearing Examiner accepted and admitted into evidence Objector's Exhibit Nos. O1-O37.

Objector's Exhibit O1 is a large document showing a May 8, 2001, potentiometric surface map prepared by Kendy Hydrologic Consulting.

Objector's Exhibit O2 is a large document showing a photograph of the igneous sill on the Smith River taken by Kendy Hydrologic Consulting.

Objector's Exhibit O3 is a large document showing a June 20, 2001, potentiometric surface map prepared by Kendy Hydrologic Consulting.

Objector's Exhibit O4 is one-page well location map with lithologic descriptions prepared by Bill Uthman.

Objector's Exhibit O5 is a copy of a document, prepared by Bill Uthman and enlarged by FWP, showing water level measurements in the Springdale pumping well.

Objector's Exhibit O6 is a copy of a document, prepared by Bill Uthman and enlarged by FWP, showing water level measurements in the Springdale observation well.

Objector's Exhibit O7 is a copy of a document, prepared by Bill Uthman and enlarged by FWP, showing an aquifer test analysis of the Springdale observation well drawdown data.

Objector's Exhibit O8 is a copy of a document, prepared by Bill Uthman and enlarged by FWP, showing residual-drawdown recovery analysis of the Springdale pumping well.

Objector's Exhibit O9 is a copy of a document, prepared by Bill Uthman and enlarged by FWP, showing projected drawdown at the South Fork of the Smith River based on aquifer test analysis of Springdale observation well drawdown data.

Objector's Exhibit O10 is a copy from USGS Circular 1139 and enlarged by FWP containing three sketches of different aquifer scenarios.

Objector's Exhibit O11 is a two-page copy of crop consumption calculations using TR-21.

Objector's Exhibit O12 is a large document showing estimated water consumption under current and proposed conditions.

Objector's Exhibit O13 sixty-one pages of supplemental environmental assessment information, including: *Executive Summary, Supplemental Environmental Assessment*, Appendix A (February 14, 2003), *Supplemental Environmental Assessment Addendum* (May 16, 2003). This exhibit was added to the Department file by the Hearing Examiner without objection because the file did not contain a copy. The documents were prepared by Department staff.

Objector's Exhibit O14 is a one-page copy of the Uthman July 5, 2000, memorandum regarding “Application for Beneficial Use 41J-P111522-00 for Springdale Colony”.

Objector's Exhibit O15 is an eleven-page copy of the Uthman May 31, 2002, report regarding “Report on Groundwater – Surface Water Interactions”.

Objector's Exhibit O16 is a three-page copy of the Uthman March 8, 2001, memorandum regarding “Cumulative Impacts to Smith River Surface Flow from Groundwater Wells”.

Objector's Exhibit O17 a two-page copy of a spreadsheet containing upper Smith River basin discharge measurements prepared by Larry Dolan.

Objector's Exhibit O18 is four pages of Smith River flow charts and data from the Supplemental Environmental Assessment (February 14, 2003).

Objector's Exhibit O19 is a copy of pages one to twelve from the *Upper Missouri Water Availability Analysis* (1997) prepared by the Department.

Objector's Exhibit O20 is a one-page list of the Smith River FWP Murphy Rights.

Objector's Exhibit O21 is a one-page list of the Smith River FWP Water Reservations.

Objector's Exhibit O22 a twenty-three-page copy of an attachment to the FWP water right claims based on Murphy Rights.

Objector's Exhibit O23 is a copy of six pages of the FWP *Application For Reservation Of Water In The Missouri River Basin*.

Objector's Exhibit O24 is a copy of pages 182 to 185, and page T-5 from the Missouri River Basin Closure Final Order.

Objector's Exhibit O25 is a copy of pages one to five of the Board of Natural Resources and Conservation February 10, 1995 Meeting minutes.

Objector's Exhibit O26 is a twenty-nine-page copy of water reservation correspondence between FWP and the Board of Natural Resources and Conservation.

Objector's Exhibit O27 is a two-page copy of monthly flows for streams in the Missouri River basin.

Objector's Exhibit O28 is a one-page USGS graph of Smith River discharge between August 12, 2002 and August 11, 2003.

Objector's Exhibit O29 consists of five pages of documents regarding FWP Smith River calls on junior appropriators.

Objector's Exhibit O30 is a large document map showing FWP Murphy Rights and Instream Flow Reservations.

Objector's Exhibit O31 is a seven-page copy of Smith River trout population documents prepared by FWP.

Objector's Exhibit O32 is a large document prepared by FWP charting trout population against flow between 1969-2003.

Objector's Exhibit O33 is a large document prepared by FWP charting trout population by age against three flow ranges for the period 1978-2000.

Objector's Exhibit O34 is a large document prepared by FWP charting trout population by age against two flow ranges between 1978-2000.

Objector's Exhibit O35 is a large document containing a photograph of a pool of water in a dry portion of the Smith River streambed.

Objector's Exhibit O36 is a large document showing a close up of the pool shown in Exhibit O35.

Objector's Exhibit O37 is a copy of a one-page undated letter to the Meagher County Conservation District from John McGuire, a copy of which was received in the Lewistown Water Resources Regional Office May 7, 2002.

PRELIMINARY MATTERS

The Hearing Examiner discovered after the hearing that he did not have Objector’s Exhibit Nos. O20 and O21. A copy was obtained from Objector FWP’s counsel and faxed to both parties. There were no objections to use of these copies as the original exhibits.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit No. 40J 11508000 in the name of Springdale Colony and signed by David E. Wipf, Secretary-Treasurer, was filed with the Department on March 15, 2001. (Department file)

2. The Environmental Assessment (EA) dated May 22, 2003, prepared by the Department for this application and the *Executive Summary, Supplemental Environmental Assessment* (SEA), including Appendix A (February 14, 2003), *Supplemental Environmental Assessment Addendum* (May 16, 2003) were reviewed by the Hearing Examiner and are included in the record of this proceeding. (Department file, and Exhibit O13)

3. Applicant seeks to appropriate 2.9 cubic feet per second (cfs) up to 344 acre-feet of water per year from ground water. The water is to be diverted at a point in the NE¼NE¼NE¼ of Section 10, Township 08 North, Range 06 East, Meagher County, Montana. The proposed means of diversion is an existing well. The proposed use is to provide supplemental irrigation to 510.5 acres. The proposed place of use is 390.1 acres in Section 31, and 120.4 acres in Section 32, all in Township 09 North, Range 06 West, Meagher County, Montana. The proposed period of diversion and period of use is March 15 through September 30, inclusive, of each year. The proposed volume of 344 acre-feet will be pumped from an existing well and stored in an existing reservoir 170 acre-feet in size called Alkali Lake located in the SE¼SW¼SW¼ of Section 31, Township 09 North, Range 06 East, Meagher County, Montana. (Department file)

4. When water from this well is not being pumped to an existing 282-acre center pivot under Beneficial Water Use Permit No. 41J 11152200, it will be pumped and stored under this project in Alkali Lake pursuant to the requested permit. Only when water is not going to the center pivot would it be diverted to Alkali Lake under the requested permit. The uses are mutually exclusive meaning water can go either to the pivot or to Alkali Lake, but not both at the same time. The following rights are used to

store water from surface sources in Alkali Lake and irrigate nearby land: Water Right Claim Nos. 41J 01251900, 41J 01252000, 41J 01252100, 41J 01252600, 41J 01252700. (Department file, testimony of John Wipf, Otto Ohlson)

5. The Applicant has provided hydrologic evidence as required by Mont. Code Ann. § 85-2-311(5). (Department file)

Physical Availability

6. The well for this project has been in use at 1300 gallons per minute (gpm) on 282 acres under Beneficial Water Use Permit No. 41J 11152200 since 2000. Permit No. 41J 11152200 was issued for 1350 gpm up to 727.8 acre-feet for use between May 1 and August 30 of each year. The well was in constant use during the irrigation season. Applicant also performed a seven-day continuous rate (1300 gpm) pumping test on the well in October 2003 using a protocol obtained from Joe Michaletz (Applicant's expert). Applicant asserts that the season-long pumping and the pumping test in the late season, after pumping to the 282-acre pivot had ended, show water is physically available. Water is physically available. (Department file, testimony of John Wipf)

Legal Availability

7. Applicant's expert Joe Michaletz projected a season-long radius of influence of 1000 feet based on the data from the seven-day pumping test and his interpretation of the local geology from area well logs. Applicant's expert concluded that the existing wells within this radius of influence (cone of depression) have sufficient available drawdown to continue operation under the proposed changed conditions. Applicant's area of potential impact analysis did not show that surface water would be intercepted and Applicant concluded that water was therefore legally available. (Department file, testimony of Joe Michaletz, Dan Hurwitz)

8. Applicant provided no legal availability determination using an analysis of evidence on physical availability and the existing legal demands in the South Fork of the Smith River. Applicant's expert observed no drawdown in observation well MW8 and concluded that the cone of depression did not extend to the South Fork of the Smith River. Applicant's expert did not avail himself of hydrologic methods to estimate through

calculations the extent of the cone of depression. Instead, he estimated the cone of depression to be half way (about 714 feet) between the pumping well and observation well MW8 which is located 10-20 feet east of the South Fork of the Smith River from the pumping well. Applicant's expert theorized that the lack of response to pumping in observation well MW8 supports his opinion that the cone of depression extends half way to the South Fork of the Smith River. Because Applicant assumed the cone of depression did not reach the surface water, no analysis was made on legal availability with regard to the South Fork of the Smith River. Applicant's expert relied on ground water reference books, information in Applicant's previous Application for Beneficial Water Use Permit No. 41J 11152200 (issued August 4, 2000), area well log lithologic information, other studies in the area, a United States Geological Survey map, and professional judgment. Applicant did not construct observation wells between Applicant's pumping well and the South Fork of the Smith River to confirm the extent of the cone of depression from pumping the production well. (Testimony of Joe Michaletz)

9. The analysis (using ground water modeling) and testimony of Staff on the Applicant's seven-day pumping data, and the testimony of Objector's expert, Dr. Eloise Kendy, agree that the cone of depression from pumping Applicant's well will extend to the South Fork of the Smith River in less than seven days. The area of potential impact includes the South Fork of the Smith River. (Department file, testimony of Bill Uthman, Dr. Eloise Kendy)

Adverse Effect

10. Applicant has used the subject well of this application under Beneficial Water Use Permit No. 41J 11152200. The well has been pumped season-long for use on the 282-acre irrigation pivot, and neighboring wells have not been affected such that they have not been able to exercise their ground water rights. Applicant performed a seven-day pumping test in October 2003. Applicant observed drawdown in neighboring wells, but the drawdown is not great enough to prevent use of the nearby wells. No season-long projection of drawdown was made. Applicant asserts that performing the pumping test in October 2003, after a season of pumping from the well, indicates there will be no adverse effect on area ground-water users during the requested period of use. There is

no adverse effect on area ground-water appropriators. (Department file, testimony of John Wipf, Joe Michaletz, Dan Hurwitz)

11. Objector FWP has state water reservations (7 cfs) on the South Fork of the Smith River. Objector FWP has state water reservations (78.5-150 cfs) and claims (90-400 cfs) on the mainstem of the Smith River. These rights were determined by defining the minimum flow necessary to maintain the fishery habitat. Streamflow measurements made at times that the Applicant was appropriating water under their current beneficial water use permit show that Objector FWP's water right was not being met during these times. Objector FWP sent letters to Smith River appropriators in five recent years requiring junior right holders to stop diverting, and limited fishing hours to reduce stress on fish in the Smith River. Projections of effects on streamflows show surface-water flows have been affected by conversion from flood irrigation to sprinkler irrigation. Objector and prior appropriator FWP's use of the water has been affected during low flows in the Smith River and its tributaries. Fish population is affected when flows drop below that identified in FWP's water rights in the hatching year. Applicant provided no plan to show how Objector FWP's water right will be satisfied during exercise of a permit as requested at times streamflows drop below FWP's water right flow. (Department file, testimony of Kathleen Williams, Larry Dolan, Steve Leathe)

12. Objector's expert concluded that water pumped from Applicant's well under proposed permit will also capture water that would otherwise flow to the South Fork of the Smith River were it not used to supplement existing surface water supplies for sprinkler irrigation. Captured water means water that is removed from the aquifer instead of flowing from the aquifer into the South Fork of the Smith River. The South Fork of the Smith River is a gaining stream[1] in the reach adjacent to the Applicant's well. Objector's expert asserted that increasing the use of ground water for sprinkler irrigation will decrease the flow of ground water that would discharge to the South Fork of the Smith River. The decrease in surface flow is ground water that is proposed to be diverted for the supplemental sprinkler irrigation and most of it will not return to the

[1] A gaining stream is a stream that receives ground-water flow from an aquifer. A losing stream is one that loses flow to an aquifer. A stream can switch between gaining and losing during different seasons of the year and along different reaches.

Smith River because it will be consumed through evapotranspiration. Objector's expert concluded use of the well for this supplemental purpose would reduce flows in the South Fork of the Smith River by 0.22 cfs during a normal irrigation season and 0.56 cfs during a dry year. Objector FWP's prior appropriation will be adversely affected by additional flow reductions in the South Fork of the Smith River resulting from the proposed use. (Testimony of Dr. Eloise Kendy)

Adequacy of Appropriation Works

13. Applicant has used the appropriation works in the well to pump water to the center pivot in use under Beneficial Water Use Permit No. 41J 11152200 since 2000. The well has provided the flow rate necessary to irrigate the 282-acre place of use. Applicant has tested the pump in the well and the pipeline to Alkali Lake and found they can deliver the requested 1300 gpm. The appropriation works are adequate. (Department file, testimony of John Wipf)

14. Alkali Lake cannot be used to store water over winter. The dam leaks and the water would be lost over the winter. The dam is adequate for storage during a single season. (Department file, testimony of Otto Ohlson)

Beneficial Use

15. Applicant will supplement the surface water now used to irrigate small grains, oil seeds, alfalfa, and grass hay in rotation at the proposed place of use. However, the surface-water sources do not typically supply sufficient water for full crop irrigation in five or six years out of a twenty-year period. The cost of electricity to pump this water requires extreme care and planning to prevent water waste or pumping water which is not needed. The Applicant is a good water manager interested in efficiency. The flow and volume of water requested are reasonable for this purpose. (Department file, testimony of John Wipf, Otto Ohlson)

Possessory Interest

16. Applicant is the owner of the property which has been designated in the Application as the place of use. Applicant has a possessory interest in the place of use. (Department file, testimony of John Wiph)

Water Quality Issues

17. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge-permit holder to satisfy effluent limitations of his permit. (Department file.)

Basin Closure Issues

18. The proposed well is located in the Smith River valley which is within the Upper Missouri River basin closure area. The Department cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Part 2 of Title 85 Chapter 2 for all of the subbasins of the Upper Missouri River basin. The "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. § 85-2-342(4). However, this closure does not apply to ground water which is not immediately or directly connected to surface water. Mont. Code Ann. § 85-2-343(2)(a) and § 85-2-342(2) (Department file)

19. The Lewistown Water Resources Regional Office of the Department made a written determination in the EA that water from the subject well is ground water which allowed processing of the Application to continue. The EA determination was based on memorandums from the Department's Water Management Bureau regarding Springdale Colony's original permit for this well (Beneficial Water Use Permit No. 41J 11152200) and a permit for another area well (Skelton). (Department file)

20. Applicant pumped the well (1427 feet from the South Fork of the Smith River) for seven days, using a test protocol provided by the Applicant's expert, while observing water levels in the pumping well and nearby wells. The nearby observation wells included a well on the east side of the South Fork of the Smith River (MW8). Applicant's expert observed no drawdown in well MW8 and concluded, based upon measured drawdowns in the observation wells, the local geology, and the projected radius of influence from the seven-day pumping test that the cone of depression did not reach the South Fork of the Smith River. The Staff expert and Objector's expert agree that no drawdown in MW8 would occur if the cone of depression beneath the South Fork of the

Smith River induced sufficient recharge to stop the further extension of the cone of depression to MW8. (Testimony of John Wipf, Joe Michaletz, Dr. Eloise Kendy, Bill Uthman)

21. The Staff expert used the Applicant's seven-day pumping test data to project the extent of the cone of depression after 100 days of pumping. The Staff expert projects five (5) feet of drawdown under unconfined conditions, and four (4) feet of drawdown under confined conditions at the South Fork of the Smith River after continuous pumping at a 1300 gpm rate for 100 days. The Staff expert and Objector's expert believe the aquifer is unconfined after interpreting the aquifer-test analysis of the Springdale observation-well drawdown data shown in Exhibit O7, and after observing drawdown in the Springdale monitoring well (Lazy BH well) which is shallower than the Springdale well. The Staff expert and Objector's expert project over a foot of drawdown at the South Fork of the Smith River after pumping seven days under unconfined conditions. The requested 344 acre-feet volume requires 60 days of pumping at the requested rate. Applicant did not monitor the South Fork of the Smith River flows during the pumping test, nor ground water levels directly adjacent to the west side of the South Fork of the Smith River. Pumping under this Application will occur prior to, during, or after the regular irrigation season between March 15 and September 30. Between those dates when water is not pumped to Alkali Lake it will be pumped from the well to the 282-acre center pivot. The total seasonal pumping time for this well is the sum of the time pumped under this application and the time pumped to supply water to the 282-acre center pivot permitted under Beneficial Water Use Permit No. 41J 11152200. The cone of depression intercepts the South Fork of the Smith River after 7 days of pumping. (Department file, testimony of Joe Michaletz, Dr. Eloise Kendy, Bill Uthman)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Part 2 of Title 85 Chapter 2 for all of the subbasins of the Upper Missouri River basin. The "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. § 85-2-342(4). However, ground water that is not immediately or directly connected to surface water is exempt from the closure. See Mont. Code Ann. §§ 85-2-342(2), 343(2)(a). "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water. Mont. Code Ann. § 85-2-342(2). At the time this application was initially processed, immediate or direct connection to surface water was interpreted by the Department to be a well that is pulling surface water directly from a stream or other source of surface water. The meaning of immediately or directly connected to surface water is not explicitly defined in basin closure statutes. *See Bud Clinch Letter to Donna Burns, Administrator, Meagher County Conservation Board*, paras. 2, 3, (April 18, 2002) (hereinafter *Bud Clinch Letter*). The current Department guidelines state an applicant needs to determine whether the source aquifer is hydrologically connected to surface water and whether the proposed well creates sufficient drawdown beneath a stream to induce infiltration from the streambed. Neither the *Bud Clinch Letter* nor the current guidelines specify what time period must be used in the analysis to determine the extent of cone of depression – season-long or something less. "The proof we have accepted is a showing that the cone of depression created when the applicant's well is operated at **projected volumes** does not intercept a surface water source." (emphasis added) *Bud Clinch Letter*, above. This Hearing Examiner interprets "projected volumes" to be the volume requested in the application. This interpretation is supported by the Department's requirements for an applicant for surface water. To show water is physically available a surface-water applicant must provide evidence showing water is available **during the proposed**

period of appropriation. (emphasis added). See *INFORMATION AND INSTRUCTIONS, APPLICATIONS FOR BENEFICIAL WATER USE PERMIT* (R 9/00). In other words, an applicant cannot offer hydrologic proof for one month when they are requesting water for six months – they must offer proof covering the entire six months. Therefore, it follows that ground water applicants must determine the area of potential impact and the adverse effects for the entire proposed period of appropriation. Here, Applicant provided an analysis for seven days of pumping which extends the radius of influence to approximately 1000 feet from the pumping well. The Staff expert and Objector's expert analyses show the aquifer drawdown at the South Fork of the Smith River after seven days is over one foot. Applicant did not install observation wells near the west bank of the South Fork of the Smith River to confirm the extent of the radius of influence (cone of depression). Applicant did not measure the flows in the South Fork of the Smith River to confirm the radius of influence (cone of depression) does not intercept the South Fork of the Smith River. Instead, Applicant relied upon the lack of drawdown in observation well MW8 to conclude that the cone of depression did not reach the South Fork of the Smith River. The Staff expert and Objector's expert agree that no drawdown in MW8 would occur if the cone of depression beneath the South Fork of the Smith River induced sufficient recharge to stop the further extension of the cone of depression to MW8 – not because the cone of depression did not intercept the river. The Department projections and the accompanying testimony of the Staff expert and Objector's expert agree that the cone of depression will intercept the South Fork of the Smith River thus hydrologically connecting the Applicant's well to surface water. Without sufficient proof to the contrary, the ground water for this project is immediately or directly connected to the South Fork of the Smith River. Therefore, this Application cannot be processed or granted until final decrees have been issued for all the subbasins of the Upper Missouri River basin, Mont. Code Ann. §§ 85-2-342, 343, **and** the criteria for issuance of a permit, Mont. Code Ann. § 85-2-311(1), are met. See Finding of Fact Nos. 18, 19, 20, 21.

2. Although the Department may not process this application due to the basin closure, the Department provides its conclusions on the criteria set forth in Mont. Code

Ann. § 85-2-311. When there is no basin closure, the Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1). See Conclusion of Law No. 1.

3. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested based on the records of the Department and other evidence provided to the Department; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(a) through (h), (2).

4. The determination of legal availability pursuant to Mont. Code Ann. § 85-2-311(1)(a)(ii) is based on identification of physical water availability; identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

5. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact No. 6.

6. The Applicant has not proven that water can reasonably be considered legally available. Applicant presented limited proof that existing legal demands of nearby ground water appropriators will be met, but did not make a comparison which includes users on nearby surface water. Objectors presented evidence showing their water use is within the area of potential impact and should have been included in the comparison of water physically available with existing legal demands within the area of potential impact. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 7, 8, 9.

7. The Applicant has not proven that water rights of a prior appropriator under an existing water right will not be adversely affected. Objector FWP's rights are currently affected by drought periods, increased use of ground water previously thought not to be connected to surface water, and by conversion of irrigation methods from flood to sprinkler. Applicant presented no evidence or argument regarding Objector FWP's water rights. Evidence submitted indicates that the cone of depression will intercept the South Fork of the Smith River, will capture ground water tributary to the South Fork of the Smith River, and adversely affect flows in the South Fork of the Smith River. The record shows that Objector FWP's water rights will be adversely affected by the proposed use. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact Nos. 10, 11, 12.

8. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact Nos. 13, 14.

9. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. Mont. Code Ann. § 85-2-102(2) and § 85-2-311(1)(d). See Finding of Fact No. 15.

10. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 16.

11. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h), (2). See, Finding of Fact No. 17.

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit and if the water is not ground water immediately or directly connected to surface water in the Upper Missouri River basin. Here, the ground water requested is immediately or directly connected to surface water in a basin closure area **and** Applicant has not met the criteria for issuance of a permit. Mont. Code Ann. §§ 85-2-312, 342, 343. See Conclusions of Law Nos. 1, 6, 7.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 41J 11508000 by Springdale Colony is **DENIED**.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by March 30, 2004, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by April 19, 2004, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 10th day of March, 2004.

_____

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 10th day of March, 2004, by first-class United States mail.

JAMES B LIPPERT
ATTORNEY AT LAW
PO BOX 1636
BIG TIMBER, MT 59011

JOHN WILSON
MT TROUT UNLIMITED
PO BOX 412
HELENA MT 59624

BECKY DOCKTER
MONTANA FISH WILDLIFE &PARKS
PO BOX 200701
HELENA MT 59620-0701

(Hand Carried)
BILL UTHMAN, HYDROGEOLOGIST
DNRC WATER MANAGEMENT BUREAU
PO BOX 201601
HELENA, MT 59487

SCOTT IRVIN MANAGER
ANDY BRUMMOND WRS
DNRC WATER RESOURCES
613 NE MAIN SUITE E
LEWISTOWN MT 59457-2020

_____
Catherine Leathers
Hearings Unit
406-444-6615